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Submission to the Expert Panel charged with conducting a targeted review of the structure, role and mandate of the National Energy Board

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Modernization of the National Energy Board

Submitted via Expert Panel's Website
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PRESENTATION OF KITIGAN ZIBI ANISHINABEG

The Kitigan Zibi Anishinabeg community presents these comments in regards to the public consultation on the federal modernisation of the National Energy Board. Kitigan Zibi Anishinabeg wishes to affirm that the National Energy Board Act region covers ancestral Algonquin Anishinaabe lands that were never surrendered, nor for which we have ever signed a treaty. We continue to assert our full rights to our land and seek respect from all those that reside in and/or use these lands. These comments are submitted without prejudice to our collective asserted rights. Finally, these comments are not intended to provide an inventory of our Algonquin Anishinaabe values in regards to the targeted territory, and should not be used or viewed as our all-encompassing position.

This submission builds upon a brief developed by the Assembly of the First Nations of Quebec and Labrador Sustainable Development Institute (AFNQLSDI). We thank the AFNQLSDI for their assistance.

SUMMARY OF RECOMMENDATIONS

As a result of our analysis, Kitigan Zibi Anishinabeg proposes the following recommendations to the National Energy Board Modernization Expert Panel. These follow the themes identified by the Expert Panel: mandate, governance, decision-making roles, legislative tools and engagement with Indigenous peoples in National Energy Board (NEB) processes.

To implement these recommendations, the *National Energy Board Act* will need to be reviewed to ensure that the processes under its control significantly integrate the rights of First Nations and fulfill the national and international obligations that the government has in relation to them. The legislative, regulatory and/or policy changes that will be made as a result of this review will require due consultation with First Nations.

Theme	**Recommendations of Kitigan Zibi Anishinabeg**
Mandate	• A provision must be added to the *National Energy Board Act* to affirm respect for the rights, interests, and values of Indigenous peoples as a guiding principle. • Responsibility for environmental assessments should be returned to the Canadian Environmental Assessment Agency or be assigned to another equivalent independent body. • No engagement of Indigenous peoples can be considered “consultation” unless it is directly conducted by the Crown. As a result, Indigenous participation in the NEB hearing process cannot be considered a “consultation” within the meaning of the Constitution. • All hearings must be open to anyone who wishes to participate. • All hearings must provide for the right to cross-examine the information provided by the proponent. • The deadlines must be more flexible, in respect to the complexity of the project and of their realities, in order to collect and analyze the necessary information and encourage the involvement of local actors • The NEB should support the training of First Nations, and allocate the necessary funding frameworks and capacities for this training.

Governance	• The conditions for the appointment of members of the Board must be publicly justified by the Governor in Council and specified so that the Indigenous expertise selected plays a significant role within the Board. • To respect the federal government's commitment to establishing a nation-to-nation dialogue with Indigenous peoples, a parallel Indigenous consultation committee should be formed to collaborate with the NEB in its operations, **OR** • Indigenous advisory committees should be formed, based on the territories affected by the development project, to collaborate with the NEB in its operations. • At least one third of the Board's various committees must be Indigenous members. • The NEB head office should be moved from Calgary back to Ottawa to limit its proximity to the industry and to promote its impartiality. • NEB funding needs to be reviewed. Funding could come from public funds, with additional financial contributions from promoters submitting a project.
Decision-making roles	• The United Nations Declaration on the Rights of Indigenous Peoples must be incorporated into the *National Energy Board Act,* as a basic principle guiding all decisions and recommendations of the NEB. • The panel should recommend to the government that First Nations should be considered partners of the first order in the energy industry.
Legislative tools	• Instead of acting as the industry's partner, the NEB must closely monitor it. • The NEB must ensure the transparent disclosure of monitoring and oversight data. • For better monitoring in the field, the NEB should create an independent oversight committee with Indigenous members representing the affected territories. **OR** • Create monitoring committees with Indigenous members representing the affected territories. • All major work as well as the final decommissioning of a project must be the subject of governmental permits, which will have the effect of automatically triggering the Crown's Constitutional obligations towards affected First Nations. • The NEB should act as a coordinator of the various departments which should collaborate in security and monitoring of pipeline projects. • Fair compensation that considers cumulative effects must be provided to First Nations affected by an energy development project.
Engagement with Indigenous peoples	• All hearings should be open to anyone who wants to participate (see decision-making section). • The NEB must submit its recommendations to the established Indigenous committee AND to the Governor in Council, respecting their rights. • The NEB must foster the development of First Nation competencies, adapt to their realities (timetables and local governance) and recognize their capacities. • The NEB must demand adequate funding from companies, to be allocated to affected communities.

CONTEXT OF THE NATIONAL ENERGY BOARD MODERNIZATION

On June 20, 2016, the Government of Canada officially launched a review of environmental and regulatory processes. This review focuses on four interconnected components, including the Modernization of the National Energy Board (NEB), which is the subject of this Brief.

From the time of its inception in 1959, the NEB's functions remained roughly the same until 2012 with the controversial adoption of omnibus Bills C-38 and C-45, and the failure to consult the Indigenous peoples in relation to these Bills. The *National Energy Board Act* was amended and the NEB's mandate expanded to include the conduct of environmental assessments of projects under its control. The new version of the Act also provides for new time limits for procedures, as well as limits on public and Indigenous participation.

Such legislative changes were severely criticized, including by First Nations. Prime Minister Justin Trudeau promised during the election campaign to overhaul the NEB process and to subject pipeline projects like Kinder Morgan's "Trans Mountain Expansion" and TransCanada's "Energy East" to this new process. Nevertheless, only minor adjustments to the reviews of these two controversial pipelines ended up being made, with such adjustments in no way responding to the principal criticisms directed at the NEB. In the end, the "Trans Mountain Expansion" (as well as Enbridge's "Line 3" project) were approved by the Trudeau government following the recommendation of the NEB, despite the criticisms of the review process and the strong opposition of First Nations. Similarly, the "Energy East" project continues to be subject to the same dysfunctional review process which this modernization will have no effect on.

The modernization of the NEB has as its objective a greater regulatory alignment with the expectations of Canadians and the evolution of the energy issue in Canada. Which is why Kitigan Zibi Anishinabeg is dismayed by the fact that government admits that the public has lost confidence in the NEB review process and yet continues to rely on such process for pipeline projects that will affect Canada's energy future for decades to come.

In the course of this modernization, the government has also committed to ensuring the full and complete participation of Indigenous peoples, to taking into account their viewpoints and to recognizing their rights.[1] At the same time, the federal government has committed to renewing its relationship with First Nations on the basis of a "nation-to-nation" approach, respecting its constitutional obligations and in full support of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The Indigenous question is in fact central to the criticism of the NEB and its ability to fulfill its mandate. The failure to engage with Indigenous peoples in connection with the NEB project reviews have led to several legal challenges in recent years, particularly in relation to the pipeline projects described above.

It is in light of such commitments that the Minister of Natural Resources mandated the Expert Panel to report its recommendations to him on May 15, 2017. It is also in light of these commitments that First Nations are expecting the NEB to be completely rethought and reorganized.

Kitigan Zibi Anishinabeg therefore presents in this Brief issues and solutions aimed at completely remaking the NEB, including its processes, its structure and its legislative framework, both in line with the important energy challenges that the country faces and in line as well with Canada's obligations to respect the rights, interests and values of First Nations.

[1] Government of Canada. 2016. Press release. Ottawa, June 20, <http://news.gc.ca/web/article-en.do?nid=1088199&_ga=1.67527574.660286039.1474269091>

TERMS OF CONSULTATION

Despite the government's commitment to ensuring the full participation of First Nations in this review, we must bring some of the deficiencies relative to the terms of First Nations consultation to the attention of the Expert Panel and the Minister of Natural Resources:

- In Quebec, First Nations participation in the engagement process faced significant time constraints: the Expert Panel invited Indigenous peoples to meet with them in Montreal on March 29, 2017, while submissions were scheduled for only 2 days later, on March 31, 2017. In such a short period of time, it was difficult for First Nations to advance their thinking and make final revisions to their report following their meeting with the Expert Panel.

  In general, the timeframes for this targeted review were very limited, despite the complexity of the subject and the issues raised. As a result, on January 26, 2017, the Assembly of the First Nations of Quebec and Labrador (AFNQL) appealed to Minister Carr to extend the NEB modernization engagement process. This request has not been accepted, and the response has only been sent on the 14th of March 2017.

- Financial support for Indigenous community participation was not granted until very late in the process and was not retroactive. The signing of funding agreements was significantly delayed, forcing First Nations to commit themselves without knowing the contractual terms, or to delay their activities and thus shorten the analysis.

In order to achieve concrete results and better reconciliation of the rights and interests of First Nations with the public interest, the next steps in modernizing the NEB need to be pursued in due form. This implies that reasonable timeframes must be established, that adequate financial resources must be allocated, and that a record of how the comments of First Nations were taken into account must be made accessible.

INTRODUCTION

Since time immemorial, Kitigan Zibi Anishinabeg has had a special connection with Mother Earth. Our vision of territorial and resource development is grounded in sustainability and respect, for the benefit of future generations. The environmental and regulatory processes currently in existence, particularly since the 2012 changes in Omnibus Laws C-38 and C-45, do not promote adequate environmental protection and impede our ability to occupy and use the territory in respect to our specific rights and interests.

In its current version, the *National Energy Board Act* and the processes it governs contain major defects that have been highlighted by the many legal challenges that have been filed in recent years. Such issues were also raised in a number of resolutions passed by the AFNQL.

Kitigan Zibi Anishinabeg, therefore, welcomed (although not without hesitation) news of the following mandate of the Minister of Natural Resources: "Modernize the National Energy Board to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge."[2] We fear, however, that the reforms will not result in significant changes being made to the NEB.

In order to provide input for the Expert Panel to guide it in the preparation of its recommendations, this Brief presents Kitigan Zibi Anishinabeg's specific rights and interests in the development of the territory and resources, the shortcomings of the NEB in taking into account Indigenous specificities through the experiences of certain legal cases, and an analysis of the six main themes identified by the Expert Panel. For this last part, Kitigan Zibi Anishinabeg presents for each theme a summary of the situation and the issues encountered as well as solutions to remedy the situation.

In their current form, the consultations of Indigenous peoples in connection with review processes are merely procedural exercises designed to minimize legal uncertainty, without achieving it and without taking into account the distinct realities of the communities. In addition, recent approvals of pipeline projects by the current government, made in contradiction to its commitment to sustainable development and the fight against climate change, call into question the objectivity of the decision-making process and the good faith of the consultation processes.

Interrelationships between the four components of
The Review of Environmental and Regulatory Processes

There are significant interrelationships between the modernization of the National Energy Board and the three other components of the Review of Environmental and Regulatory Processes. The existence of these interrelationships calls for a holistic approach. However, the division of the Review into four components, studied separately by different committees and with different timetables, does not allow such an approach to be adopted.

Thus, although this document concerns the modernization of the National Energy Board, we invite the Expert Panel to take cognizance of and to integrate the conclusions previously submitted in the other components of the Review in the preparation of its recommendations.

[2] Government of Canada, 2016. Press Release. Ottawa, June 20th.
<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/share-your-views/draft-terms-reference-neb.html>

CHAPTER 1: RECOGNITION OF FIRST NATION'S RIGHTS AND CAPACITIES IN TERRITORY AND RESOURCE DEVELOPMENT

ENERGY ISSUES

Our relationship to the territory is part of a holistic conceptual framework and more broadly includes the environment, land, air, water, and natural resources. As guardians of the territory, we ensure the sustainability of its resources for the well-being of future generations. The occupation and use of our territories enable us to perpetuate our activities while conscientiously considering every opportunity for development in close harmony with our values and interests.

Extracting, transporting, storing, and using energy resources (oil, gas, etc.) is a challenge that concerns us a great deal and requires substantial reflection on their potential and proven impacts. For example, incidents involving major pipeline projects (which had a Canadian annual average of 147 accidents between 2010 and 2014) can affect us in a variety of economic, environmental and/or health-related ways. The direct and indirect effects of hydrocarbon development, including climate change, must be the subject of strategic discussions in order to reconcile Kitigan Zibi Anishinabeg's vision of development with that of the government, while at the same time ensuring the coherence of the process and the result. Fair accommodations (harmonization, compensation, jobs, etc.) must offset the negative impacts suffered and take into account the cumulative and residual impacts to which our population, through its occupation and use of the territory, is the most vulnerable. We insist on being treated as partners on any project to be developed on our traditional territory and on receiving a significant part of the economic and financial benefits. Finally, our firm and definitive opposition, when we give voice to it, must also be respected.

For example, the Assembly of First Nations of Quebec-Labrador in June 2016 affirmed its official opposition to the Energy East project. In a consensual manner and by virtue of their rights and their jurisdiction, the communities felt that the project represented a threat to the collective that ran counter to their values and interests. The AFNQL also requested that the NEB process be terminated, reiterating that "the NEB has neither the capacity nor the mandate to respond to the obligation to consult".

Generally speaking, in order for any energy project to be consistent with our rights and values, assessment and decision-making processes must include our meaningful involvement as early as possible.

RESPECT OF RIGHTS, TITLES AND TREATIES

Aboriginal rights, aboriginal title and First Nations treaty rights stem from the previous occupation of Canada by Indigenous peoples, as affirmed in the *Constitution Act, 1982*. Under the Constitution, the Crown has an obligation to consult and accommodate First Nations when it considers decisions or actions that may have adverse effects on aboriginal or treaty rights, established or affirmed.

International law also recognizes the rights of First Nations to development in the United Nations Declaration on the Rights of Indigenous Peoples[3], adopted by Canada in November 2010 and which the current government has committed to fully support. In particular, Article 32 of UNDRIP states that, "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources." UNDRIP states that the free, prior and informed consent of First Nations is required for development activities in their traditional territories and in the development of legislative and administrative measures affecting them.

Decisions of Canadian tribunals subsequent to these national and international recognitions has clarified and guaranteed the rights of First Nations. The decisions in *Delgamuuk v. British Columbia* (1997), *Haida Nation v. British Columbia* (2004), *Mikisew Cree First Nation v. Canada* (2005) and *Tsilhqot'in Nation v. British Columbia* (2014) are examples that reflect only a portion of the multiple contexts in which First Nation law evolves. Recognition of the rights of Indigenous peoples must guide the relationship of governments with First Nations.

In matters of resource development and infrastructure projects, the obligation to "consult" First Nations is tied to "consent". Nevertheless, the nature and extent of such rights are often the object of legal disputes because governments fail to adequately carry out their consultation duties. It is clear that the jurisprudence in Canadian Aboriginal law is constantly evolving, particularly at the level of the Supreme Court. There is more and more acceptance that "consent" is required. As evidence of this, in the *Tsilhqot'in Nation v. British Columbia* (2014) decision, the Chief Justice offered the following advice to governments and industry:

> "Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."

In respect to consultation, Article 32 of UNDRIP explains that consultation goes beyond a mere procedural gesture and is directed rather at obtaining consent:

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

[3] *United Nations Declaration on the Rights of Indigenous Peoples* <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>

RESPECT FOR INDIGENOUS GOVERNANCE

Regardless of this debate under "Canadian Law", it is critical to remember that First Nations are distinct from Canadians. They are sovereign Nations that have always, and still up until this day, possessed their own laws, cultures, languages, territories, peoples and governments. First Nations never abandoned the right to control and manage what takes place within their respective borders. In virtue of these rights, local processes and mechanisms are established within communities and empower them. The United Nations Declaration on the Rights of Indigenous Peoples (Article 18) also supports the development of decision-making institutions specific to First Nations.

Kitigan Zibi Anishinabeg has tools (databases, etc.) that support our development and enable us to integrate our expertise and traditional knowledge into our decision-making processes, while ensuring respect for our values and interests. These structures support our right to give our free, prior and informed consent and to contribute to the successful development of projects.

CHAPTER 2: THE PLACE OF FIRST NATIONS IN RECENT NATIONAL ENERGY BOARD APPROVALS

There is no provision in the *National Energy Board Act* to consult with Indigenous peoples. While the NEB acknowledges the contribution of First Nations to energy development,[4] the most recent court filings of legal notices and applications demonstrate the multiple failures of the NEB to adequately consult and accommodate First Nations. The following cases demonstrate the interest and need to not only "modernize" the NEB but to completely overhaul it in order to ensure that the rights of First Nations are respected.

- Since 2013, the Tsleil-Waututh Nation in British Columbia has opposed the Trans Mountain project of Kinder Morgan. In 2015, the Tsleil-Waututh Nation filed a lawsuit against the NEB regarding the lack of consultation with Indigenous peoples. Despite this, the federal government approved the project in November 2016. Tsleil-Waututh and a number of other First Nations in British Columbia filed legal proceedings challenging such approval. The cases are all pending.

- The Chippewas of the Thames First Nation filed a notice of application in the Federal Court of Appeal in 2014 to withdraw the license granted by the NEB to Enbridge for the reversal and expansion of Line 9B (Ontario-Montreal). The Chippewas of the Thames First Nation argued that there had been inadequate consultation of First Nations. The Federal Court of Appeal dismissed the application and in December 2015 The Chippewas of the Thames First Nation filed its application with the Supreme Court of Canada. A year later, the case was heard in the Supreme Court. The case is pending.

- In 2014, the Inuit of Clyde River requested a judicial review of the NEB's decision to grant a permit to a Norwegian consortium (TGS-NOPEC et al.) to conduct seismic testing in Baffin Bay off the coast of Baffin Island, Nunavut. They also claimed that the NEB did not properly consult the

[4] Expert Panel , 2016. National Energy Board Modernization. Engagement with Indigenous peoples. < http://www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/25rgltrsnpsht-eng.html >

affected Indigenous communities. The Federal Court of Appeal dismissed the application. In 2015, the plaintiffs filed a new application with the Supreme Court, which was heard in December 2016. The case is pending.

- In 2014, the Gitxaala Nation sought a judicial review of the report of the Enbridge Northern Gateway Review Panel. It also sought a judicial review of the Governor in Council Order and filed a notice of appeal for the Certificates of Public Convenience and Necessity issued by the NEB. **The Federal Court of Appeal, noting the inadequacy of meaningful consultation, ruled in support of the Gitxaala Nation**.

- In 2016, the Aroland First Nation and Gionoogaming First Nation in Ontario challenged the NEB's legitimacy in granting TransCanada permission to perform maintenance work on their territory. They argued that consultation remains an obligation in the context of work on existing facilities. The Aroland First Nation and Gionoogaming First Nation asserted that the *National Energy Board Act* is unconstitutional and violates their rights. The case is pending.

Tar sands development has engendered a wave of widespread opposition among the First Nations of North America. Signed by 122 nations to date, the Treaty Alliance Against Tar Sands Expansion demonstrates that this opposition is shared across borders by many First Nations in Canada and the United States. The Alliance demonstrates that the welfare of Mother Earth does not depend on the administrative boundaries imposed by governments and that the protection of the territory is the responsibility of all.

These cases attest to the legal uncertainty surrounding NEB processes and the need for in-depth changes to the law. More than simply a validation of consultation procedures, the government must strive for the attainment of the reconciliation of the values of the First Nations, for the benefit of all.

CHAPTER 3: FOR MODERNIZATION OF THE NATIONAL ENERGY BOARD

In the following paragraphs, Kitigan Zibi Anishinabeg will present our thinking on the six themes identified by the Expert Panel. In the end, the key elements for a successful modernization are the decrease of the powers of the NEB and a fundamental reform of its processes. It is on that basis that Kitigan Zibi Anishinabeg issues its recommendations.

Kitigan Zibi Anishinabeg's remarks are based on our understanding of the *National Energy Board Act* and the actions of the National Energy Board and do not purport to be exhaustive.

MANDATE

The NEB's mandate is to promote safety and security and to regulate, in the "Canadian public interest," pipelines and electric power transmission lines, energy development and energy trade (inter-provincial and international). The NEB's responsibilities are regulatory, advisory and organizational, as described in the *National Energy Board Act* and other related legislative instruments (*Canadian Environmental Assessment Act* (2012), *Oil and Gas Operations Act*, etc.).

Canada certainly needs an independent agency to oversee the safety and efficiency of the energy industry, to produce information on the sector and its future, and to make recommendations with respect to new energy projects. It will be impossible, however, for the NEB to fulfill any function whatsoever until such time as its structure is completely reorganized. First Nations and a large segment of the public consider that the NEB has lost all credibility and is acting more like an agent of the fossil fuel industry rather than an independent agent for the public good. We will return to such matters in the next section on governance. For the purposes of the present section, we will presume that the NEB, including its personnel, will be the subject of a complete overhaul which will permit the NEB to regain a measure of First Nations' and the public's trust.

In addition to its structure, the NEB's mandate must be completely transformed in service of helping Canada decarbonize its economy – in partnership with Indigenous Peoples – and thereby do its part in fighting climate change. As recently demonstrated in a *Parkland Institute* report[5], even if only one large Liquified Natural Gas export facility is built in British Columbia and Alberta tar sands emissions only rise by 50% (in both instances, well below industry's ambitions for both sectors), the oil and gas sector will take up 45 per cent of Canada's carbon budget by 2030 (compared to 26 per cent at present), requiring a 47 per cent reduction in the emissions of the rest of the Canadian economy by 2030 (compared to emissions in 2014) – a herculean and unrealistic task. Canada can no longer, therefore, rely on an increase in its production of fossil fuels, particularly in the Alberta tar sands industry, and the NEB's mandate must absolutely be revised in order to help Canada make the necessary transition away from fossil fuels, including through the use of green and sustainable technologies, the whole in partnership with Indigenous Peoples.

We will detail below the major shortcomings of the NEB's mandate, including in respect to the rights of First Nations:

- The NEB's regulatory functions require it to establish regulatory policies (subject to the approval of the Governor in Council) concerning the design, construction, operation and abandonment of a pipeline.

  There is, however, no collaborative process between the NEB and First Nations as to the elaboration of policies and regulations that directly affect developments on their lands.

- The NEB's advisory functions allow it to hold hearings, written or oral, with those individuals it deems directly affected. Following the filing of a project application, the NEB is responsible for notifying those concerned, who have 30 days to study the application and to request a hearing.

  Kitigan Zibi Anishinabeg considers that "consultations" as held by the Board actually restrict the participation of Indigenous peoples. In addition, we don't believe that the right to appear before the NEB should depend on the NEB deciding who can participate and how.[6] Kitigan Zibi Anishinabeg is of the view that, despite the time saved, this restriction limits the provision of relevant information and prevents the consideration of all direct, indirect, cumulative, and residual project impacts.

- Under the *National Energy Board Act*, 15 months are allocated to the NEB to conduct hearings, review, analyze and write its recommendations report.

[5] Hugues, D. 2016. Can Canada expand oil and gas production, build pipelines and keep its climate change commitments? <https://d3n8a8pro7vhmx.cloudfront.net/parklandinstitute/pages/361/attachments/original/1464803560/cancanadaexpand.pdf?1464803560>

[6] National Energy Board, 2013. Hearing Process Handbook, p. 9. Canada

These timetables do not correspond to the realities of the First Nations, who value the involvement of multiple actors in the community according to their own process of local governance. In addition, Kitigan Zibi Anishinabeg adopts a holistic approach to analysis where many factors (economic, environmental, and social) must be considered according to the development project and therefore require more time, human resources, and adequate funding.

- Since 2012, rather than the Canadian Environmental Assessment Agency, the NEB has been responsible for environmental assessments of designated projects within the meaning of section 2 of the *CEAA (2012)*. The level of detail of the environmental and socio-economic assessment required by the NEB depends on "scope, intended effects and public interest."[7]

  No pre-defined environmental assessment process, including any that provide for the participation of Indigenous peoples, is followed by the Board. The Board acts on a case-by-case basis, in reaction and subsequent to the work of the project initiator it is reviewing. This lack of transparency does not ensure meaningful First Nations involvement in processes.

- Since 2013, rather than Transport Canada, the NEB "regulates pipeline construction while protecting navigation; [and] Transport Canada supports the Board by sharing its knowledge". In addition, rather than Fisheries and Oceans Canada, the NEB assesses the potential impacts on fish and fish habitat of the projects it regulates.

  Kitigan Zibi Anishinabeg is of the view that the NEB does not have the capacity nor the expertise to fulfill such environmental assessment responsibilities, and that its work should focus only on the regulatory and oversight aspects of the project review process. In fact, the NEB does not follow any defined collaborative process with First Nations in the areas of protection of navigation and protection of fish and fish habitat.

> Here, the interrelationship between the four components of the Review of Environmental and Regulatory Processes is evident. Kitigan Zibi Anishinabeg believes that the federal government should have taken a holistic approach to this review and ensured cohesion among its components. We hope that the Expert Panel will take the opportunity to incorporate the comments received in previous targeted reviews.

- With respect to monitoring and oversight, section 49 of the *National Energy Board Act* specifies that the Board may appoint inspectors to ensure the safety of the public and the environment and ensure the conformity of the work.

  First Nations are de facto unsolicited by the NEB, which generally relies on companies to monitor themselves and follow a "rigorous compliance and enforcement program holding companies accountable for results"[8] in which First Nations are only occasionally involved (see also the legislative tools section).

In general, Kitigan Zibi Anishinabeg believes that the Board is responsible for too many and too varied tasks, blurring its objectives and bringing into question the objectivity of the decision-making process. In addition, Kitigan Zibi Anishinabeg is dismayed by the lack of emphasis placed on the contribution of Indigenous peoples to the NEB's various responsibilities.

[7] National Energy Board, 2016. NEB Filing Manual, p.76. Canada
[8] National Energy Board. Website. <https://www.neb-one.gc.ca/bts/whwr/nbfctsht-eng.html>

In light of the above, Kitigan Zibi Anishinabeg makes the following recommendations that aim to better define the mandate of the National Energy Board and encourage the participation of Indigenous peoples:

Recommendations of Kitigan Zibi Anishinabeg - MANDATE:

- **A provision must be added to the *National Energy Board Act*** to affirm respect for the rights, interests, and values of Indigenous peoples as a guiding principle.

- **The NEB mandate should be split:**
  - Responsibility for environmental assessments should be returned to the Canadian Environmental Assessment Agency or be assigned to another equivalent independent body. Not only does the NEB not possess the expertise necessary to adequately carry out the assessments, but it will not be possible for the NEB to regain the necessary trust, namely from First Nations, to carry out such exercise. In addition, future environmental assessments must be carried out in partnership with First Nations, and at the end of the process, First Nations must have real decision-making power.
  - The NEB should not regain the decision-making powers it possessed for major projects – a point we will return to below.
  - With respect to the recommendations that the NEB may make regarding new projects, as mentioned above, the decarbonisation of the economy and the attainment of greenhouse gas (GHG) emission reduction targets must prevail over any economic considerations.

- Regarding the forecasts that the NEB publishes and the energy advice that the NEB makes (presuming once again that the NEB, through the current reform, can regain the trust necessary to conserve such roles), the NEB must put forward forecasts and advice that help Canada attain ambitious GHG emission targets. As a general rule, there should be no distinction between Canada's energy policy and a necessarily ambitious climate policy.

- In terms of consultation, Kitigan Zibi Anishinabeg wishes to specify that no engagement of Indigenous peoples can be considered "consultation" unless it is directly conducted by the Crown. As a result, **Indigenous participation in the NEB hearing process cannot be considered a "consultation" within the meaning of the Constitution**.

- Whatever process led by NEB in terms of engagement, it should consider:
  - That all **hearings must be open to anyone** who wishes to participate.
  - All hearings must provide for **the right to cross-examine** the information provided by the proponent. Written responses allow the proponent to provide overly general and incomplete responses.
  - That the **deadlines must be more flexible**, in respect to the complexity of the project and of their realities, in order to collect and analyze the necessary information and encourage the involvement of local actors.

- To promote participation and the development of First Nations' monitoring and oversight skills, the NEB should **support the training of First Nations, and allocate the necessary funding frameworks and capacities for this training.**

GOVERNANCE

As previously mentioned, given the crisis of confidence affecting the NEB, it will not be possible to remedy the situation through making minor adjustments. Newly named members must be named in a transparent manner. The composition of the Office will have to be renewed. The nomination of members who come from our Nations is also critical.

In terms of governance, Kitigan Zibi Anishinabeg would like to draw attention to the issues that undermine the representation of Indigenous peoples within the National Energy Board. We would also like to highlight certain practices which affect the credibility of the members of the Board and its impartiality:

- The Board is comprised of permanent and temporary members appointed by the Governor in Council on the basis of unclear appointment criteria. For example, the personal competencies required simply refer to knowledge of the industry and financial practices, law, adjudicatory practices and Canadian Indigenous issues.[9]

  In addition, the Board's expertise is "collective" and having one sole member with Indigenous knowledge is inadequate to provide the Board with sufficient expertise to fulfill its responsibilities. Nothing specifies the status (permanent or temporary) of this member nor his or her specific tasks. This person would only be able to act in an advisory capacity, without decision-making power.

  According to these criteria, Indigenous expertise is diluted in the work of the Board. Kitigan Zibi Anishinabeg is of the view that a single Indigenous member cannot represent all of the different perspectives of Indigenous peoples, especially if this member is not elected by Indigenous political authorities.

- The powers and responsibilities of the Chairperson are too great. The Act gives the Chairperson responsibility for the direction and control of the management of the Board. As a result, the Chairperson designates and distributes work to members. The Chairperson is also able to redefine the number of members required for a quorum in order to meet initially scheduled deadlines, and may appoint one member to be solely responsible for the application. All of these reasons suggest that the Chairperson's duties minimize the involvement of the member with Indigenous knowledge.

- Section 5 of the *National Energy Board Act* stipulates that members of the Board must remain close to Calgary, the location of the head offices of the NEB since 1991. In the opinion of Kitigan Zibi Anishinabeg, the credibility of the members of the Board is thereby challenged. Indeed, members are unlikely to remain impartial when dealing with the industry on a daily basis and throughout their term of office, which may extend beyond seven years.

- NEB funding is private and industry-based. The funding mechanism affects the impartiality of the Board.

[9] National Energy Board, 2016. Governance Manual, p. 26.

Thus, in terms of governance, Kitigan Zibi Anishinabeg points to the lack of Indigenous representation within the Board, its lack of credibility in Indigenous and environmental knowledge, and its inability to ensure its impartiality. It is not enough to have a symbolic presence in order to represent significantly all the views of the First Nations on energy development and to claim exhaustiveness as well as consideration of traditional knowledge. In support of this, Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples emphasizes that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, **through representatives chosen by themselves**...".

The NEB must adopt the principles reflected in this international declaration of rights and therefore, to better represent the interests of Indigenous communities, Kitigan Zibi Anishinabeg makes the following recommendations:

Recommendations - GOVERNANCE:

- **The conditions for the appointment of members of the Board must be publicly justified** by the Governor in Council and specified so that the Indigenous expertise selected plays a significant role within the Board.
  - The Governor in Council must rely on Indigenous political entities to appoint a member.

- **Indigenous representation in NEB processes is essential**. It promotes the sustainable development of projects in respect to future generations. In addition, to respect the federal government's commitment to establishing a nation-to-nation dialogue with Indigenous peoples:
  - A parallel Indigenous consultation committee should be formed to collaborate with the NEB in its operations OR
  - Indigenous advisory committees should be formed, based on the territories affected by the development project, to collaborate with the NEB in its operations.

- At least **one third of the Board's various committees must be Indigenous members**.

- **The NEB head office should moved from Calgary back to Ottawa** to limit its proximity to the industry and to promote its impartiality.
  As such, **section 5** of the *National Energy Board Act* requiring NEB members to work in Calgary should be revised.

- **NEB funding needs to be reviewed.** Funding could come from public funds, with additional financial contributions from promoters submitting a project.

DECISION-MAKING ROLES

An analysis of the NEB's decision-making roles brings to light its failure to recognize the rights of Indigenous peoples and their autonomy. The following points demonstrate that the NEB does not incorporate Articles 18 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which state that "**Indigenous peoples have the right to participate in decision-making** in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions" and that "**States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions** in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." And as previously mentioned, article 32 of the Declaration requires governments to consult Indigenous Peoples in order to obtain their consent.

Under current processes, the NEB does not adequately seek the consent of Indigenous peoples before making its decisions and recommendations. As a result, the NEB also disregards the *Constitution Act*, which guarantees the recognition of their rights and land claims agreements.

- Since 2012, for major projects that it regulates (pipelines over 40 km in length), the Board has prepared recommendations to the Governor in Council (GIC), which issues final approval by decree.

  Kitigan Zibi Anishinabeg is of the view that final approval should formally revert to the GIC. As mentioned previously, the present brief sets out a much smaller role for the NEB, removing its role in the environmental assessment process and limiting its recommendations to a few particular areas dominated by the need to meet Canada's climate change obligations.

- Instead of assessing individual projects, better decisions could be made through the greater use of strategic environmental assessments carried out in coordination with the provinces and in a fully collaborative process with First Nations.

  Here again, it would not be the task of the NEB to carry out such strategic environmental assessments but it is important that the panel's report makes such recommendation.

- The panel must also explain to the government that any reform of the NEB that does not treat First Nations as nations apart, that does not let them assume their rightful place as a distinct order of government in Canada and that does not recognize that First Nations must have decision-making power will not only represent a failure of the reform process, but also a failure of the government's promise to implement the United Nations Declaration on the Rights of Indigenous Peoples and the Truth and Reconciliation Commission's Calls to Action.

- Kitigan Zibi Anishinabeg recognizes the fact that the NEB offers the possibility of presenting oral traditional evidence, but there should be a distinct and additional financial assistance program for this process. Moreover, the perception by First Nations is that the oral traditional evidence, while solicited by the NEB, has no influence on the NEB's recommendations or decisions, which can also be said for First Nations' overall participation in the NEB process.

  In addition, we don't believe that the ability to present traditional oral evidence, and to examine and cross-examine witnesses should be restricted to intervenors.[10] This restriction also

[10] National Energy Board , 2013. Hearing Process Handbook. Canada.

limits the knowledge and sharing of First Nations concerns within the NEB hearing process, which are critical to the successful development and sustainability of energy projects.

In light of the above and in spite of their rights, First Nations have no meaningful decision-making role in connection with energy projects. These facts run counter to the federal government's commitment to establishing a meaningful nation-to-nation dialogue with Indigenous peoples and working in partnership with them.

To promote such nation-to-nation dialogue while respecting the rights of Indigenous peoples, Kitigan Zibi Anishinabeg recommends:

Recommendations - DECISION-MAKING ROLES:

- **The United Nations Declaration on the Rights of Indigenous Peoples must be incorporated into the *National Energy Board Act***, as a basic principle guiding all decisions and recommendations of the NEB. More generally, the federal government must accept that it is past time that decisions regarding new major projects become collaborative exercises involving First Nations.

- If the role of the present expert panel is to help the NEB contribute to not only a more sustainable and efficient energy system but also one that respects the rights and the jurisdiction of Indigenous Peoples, the panel should recommend to the government that **First Nations should be considered partners** of the first order in the energy industry.

  The requirement to obtain the consent of First Nations does not have to be an obstacle to the creation of a more sustainable and equitable economy. The more the project treads lightly on the earth and the more the First Nations are treated, right from the beginning, as partners at all levels, the more chance there is that the project will be a success.

  A future where projects present fewer negative impacts and where First Nations are less economically marginalized should be considered a laudable goal that this panel should promote.

  All hearings must be open to anyone affected or concerned by the development of an energy project.

LEGISLATIVE TOOLS

In light of our recommendations on the Board's mandate, Kitigan Zibi Anishinabeg would like to comment on current legislation pertaining to the NEB's powers of and responsibilities for regulatory enforcement, monitoring and oversight, which Kitigan Zibi Anishinabeg proposes to limit.

For example, with respect to legislative tools concerning regulatory enforcement and monitoring, Kitigan Zibi Anishinabeg finds that "The Board retains ongoing oversight over the project and can enforce compliance through a variety of methods, including inspections, audits and administrative monetary penalties."[11] Section 131 of the *National Energy Board Act* states that, with the approval of the Governor in Council, "the Board may make regulations respecting the safety of pipelines or international power lines [...]" and also "the protection of the safety and security of the public..." (section 48).

This is a key element of the NEB mandate. As Canada embarks on a rapid energy transition towards the decarbonisation of the economy, the NEB will be called upon mainly, instead of to approve new fossil fuel infrastructure, to oversee the safe operation and, very soon, the closing down and dismantling of Canada's enormous and aging pipeline network. It is long overdue that the monitoring system relying in large part on self-monitoring by industry be set aside. Industry's track record in terms of accidents is deplorable. Once its internal organization and its personnel have been overhauled, the NEB must be given the funding and the capacity necessary to finally truly keep a watchful eye on industry.

Not only is the infrastructure aging and will, therefore, present even more risks, the NEB will also be facing an industry that will be suffering disruptions as a result of Canada's move to a decarbonized economy and that will be more than ever looking for ways to cut costs and avoid its responsibilities. This infrastructure will be an even greater threat, therefore, to the lands and the waters of First Nations. Meanwhile, the monitoring of the fossil fuel industry completely bypasses First Nations at the moment:

- "The Board may designate any person as an inspection officer for the purpose of ensuring the safety and security of the public ... to the safety and security of abandoned pipelines" (*National Energy Board Act*, section 49), but that the Board can rely heavily on the proponent to carry out monitoring activities.

  Indeed, sections 29 and 53 of the *National Energy Board Onshore Pipeline Regulations* state that "A company shall develop a surveillance and monitoring program for the protection of the pipeline, the public and the environment" and that "A company shall conduct inspections on a regular basis and audits, with a maximum interval of three years, to ensure that its pipeline is designed, constructed, operated and abandoned in compliance with [the Act]."

  Kitigan Zibi Anishinabeg is of the opinion that self-monitoring by a company is not enough. In our view, self-monitoring leads to a process with a built-in bias and discourages the disclosure of monitoring and safety information.

- The National Energy Board *Filing Manual* states that the company must appoint officials responsible for inspection, monitoring and oversight, providing assurances that they are not related to the promoter, specifying their skills and experience, including staff training needs. Kitigan Zibi Anishinabeg is of the view that this requirement of proponents by the Board in no way stipulates First Nations participation in regulatory enforcement, monitoring, and oversight activities, contrary to UNDRIP which stipulates that "States shall [...] ensure that programmes

[11] National Energy Board, 2016. Issue: Testing the evidence. <https://www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/19rgltrsnpsht-eng.html>

for monitoring [...] as developed and implemented by the [Indigenous] peoples affected [...], are duly implemented."

- For emergency management, companies must comply with the federal *Emergency Management Act* and the *Emergency Management Framework for Canada*, which call for the cooperation of various federal and provincial departments. The NEB says that it monitors, assesses and imposes measures on the companies it regulates, but Kitigan Zibi Anishinabeg has little information concerning such activities.

- The Board may convene a compensation tribunal and section 75 of the Act specifies that the company must compensate all interested parties for damages. It also "encourages companies to provide benefits to Indigenous groups that may be impacted by their projects. This could include contracting, training or business opportunities."[12]

  Beyond these provisions, Kitigan Zibi Anishinabeg would like to clearly state that, according to UNDRIP, "just, fair and equitable compensation, for the lands, territories and resources [...] which have been confiscated, taken, occupied, used or damaged [...]", must be paid to Indigenous peoples.

For better regulatory enforcement and monitoring, in which Indigenous peoples are involved in accordance with international law, Kitigan Zibi Anishinabeg recommends:

Recommendations - LEGISLATIVE TOOLS:

- **Instead of acting as the industry's partner, the NEB needs to closely monitor it.** The NEB must greatly improve its oversight and monitoring of projects, from construction to abandonment, including the appointment and training of permanent officers within the organization.

- The NEB must **ensure the transparent disclosure of monitoring and oversight data**.

- For **better monitoring in the field** and in accordance with Article 29 of UNDRIP, which supports the obligation that monitoring programs be designed and implemented by Indigenous peoples, Kitigan Zibi Anishinabeg recommends:
  - The **creation of an independent oversight committee** with Indigenous members representing the affected territories. **OR**
  - The **creation of monitoring committees** with Indigenous members representing the affected territories.
  - In addition, all major work as well as the final decommissioning of the project must be the subject of governmental permits, which will have the effect of automatically triggering the Crown's Constitutional obligations towards affected First Nations.
  - **Support for the training and supervision of Indigenous workers**, responsible for monitoring and oversight operations.

[12] National Energy Board, 2016. Engagement with Indigenous Peoples. <http://www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/25rgltrsnpsht-eng.html>

- Kitigan Zibi Anishinabeg encourages the collaboration of various departments in questions of security and monitoring, as it is in line with our holistic vision of development. In this regard, we recommend that **the NEB should act as a coordinator of the activities** of the various departments, promoting the safe development of energy projects.

- **Fair compensation that considers cumulative effects must be provided to First Nations** affected by an energy development project.

ENGAGEMENT WITH INDIGENOUS PEOPLES

As described at various points in the present brief, Kitigan Zibi Anishinabeg maintains that the NEB must undergo a major reform. If the government is really ready to listen to the public and First Nations in connection with the present reform, the NEB will no longer undertake the environmental assessments and will continue to not have any decision-making power for major projects. The NEB's new role for major projects will be lessened, but in the fulfilment of its more reserved role, the NEB should fully collaborate with Indigenous Peoples.

While the Board recognizes that "input by Indigenous peoples can help provide relevant biophysical and cultural information, identify potential environmental and socio-economic effects and strengthen mitigation measures,"[13] its actions are not consistent with this understanding. Kitigan Zibi Anishinabeg would like to bring the following facts that negatively affect the engagement of Indigenous peoples in the NEB's activities to the attention of the Expert Panel:

- There is no legislative provision to support "the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development", in accordance with UNDRIP and in respect to aboriginal and treaty rights guaranteed by the *Constitution Act*.

- The Crown relies on the NEB to fulfill its obligation to consult and accommodate First Nations at every step in the life cycle of a project, and the NEB expects project companies to consult with Indigenous groups likely to be affected by the project.[14]

  The obligation to consult and accommodate rests with the Crown alone. The obligation cannot be transferred to the NEB, which has neither the mandate nor the capacity to conduct such consultations, nor to the companies.

  These provisions negatively affect the participation of Indigenous peoples throughout the life cycle of a project in which they should be fully participating from planning to abandonment.

- In the analysis stage, the restricted hearing process, as discussed in the decision-making roles section, undermines Indigenous engagement.

  Kitigan Zibi Anishinabeg believes that the restricted hearing process does not sufficiently take into account the interests of Indigenous peoples (inclusive, holistic and multi-generational) and that, along the same lines, NEB hearings follow timetables that do not

[13] National Energy Board, 2016. Engagement with Indigenous Peoples. <http://www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/25rgltrsnpsht-eng.html>

[14] National Energy Board, 2016. Engagement with Indigenous Peoples. <http://www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/25rgltrsnpsht-eng.html>

correspond to the realities of First Nations. These limitations create a tension around non-participation, and discourage the involvement of our elders, whose mobilization is essential for the contribution of traditional knowledge. Nor do they respect local governance to which communities have every right to adhere.

- In the decision-making stage, the NEB submits its recommendations to the Governor in Council, which decides whether to approve or reject the project, by decree.

  First Nations have no decision-making power as is guaranteed by their international and national rights.

- In the monitoring and oversight stage, First Nations training, skills development and awareness is not promoted by the NEB, which without clear requirements, relies on companies to collaborate with First Nations.

- The funding granted to First Nations consists of a single amount that must be divided among the affected communities.

  This way of doing things is not practical and projects a false impression of a large amount, which once divided is minimal.

In summary, none of these stages in the life cycle of a project regulated by the National Energy Board are conducive to meaningful engagement of Indigenous peoples.

Recommendations – ENGAGEMENT OF INDIGENOUS PEOPLES:

- See the section on legislative tools for our recommendations with respect to the participation of First Nations during the entire life cycle of a project.

  It is important that all the requirements and recommendations made in this brief allow the federal government to fulfill is duty to consult and to accommodate First Nations.

- **All hearings should be open to anyone** who wants to participate (see decision-making section).

- **The NEB must submit its recommendations to the established Indigenous committee** AND to the Governor in Council, respecting their rights.

- **The NEB must foster the development of First Nation competencies**, adapt to their realities (timetables and local governance) and recognize their capacities.

- **The NEB must demand adequate funding from companies**, to be allocated to affected communities.

CONCLUSION

This Brief demonstrates the need to completely overhaul the National Energy Board, including the *National Energy Board Act*, in order to respect the rights and values of Indigenous peoples and in order to respect Canada's climate change obligations towards the world and the next generation. The United Nations Declaration on the Rights of Indigenous Peoples and the *Constitution Act* must guide this major reform and lead to legislative changes to the *National Energy Board Act* but also to changes that go well beyond the NEB.

Energy development is of great concern to First Nations, who are committed to the sustainable development of their territory in full consideration of future generations. Energy development projects require a holistic approach, currently neglected by the NEB.

We hope that the criticisms we have raised give rise to further reflection that will lead to possible solutions further on in the process, including during the obligatory consultation that the government must carry out with First Nations in connection with any contemplated reform.

In a spirit of collaboration and reconciliation, demonstrating its commitment to establishing a nation-to-nation dialogue, Kitigan Zibi Anishinabeg asks the Expert Panel to consider the material presented and to faithfully incorporate the proposed recommendations in its report.